

# COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20230913  
Docket: CA49111

Between:

**Puppet Killer Productions Inc.**

Appellant  
(Claimant)

And

**IndustryWorks Studios Inc.**

Respondent  
(Respondent)

Before: The Honourable Justice Dickson  
(In Chambers)

On appeal from: A decision under the *Arbitration Act*,  
S.B.C. 2020, c. 2, dated April 28, 2023 (*Puppet Killer Productions Inc. v.*  
*IndustryWorks Studios Inc.*).

## Oral Reasons for Judgment

Counsel for the Appellant:

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W.J.S. Scrooby  
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Place and Date of Hearing:

Vancouver, British Columbia  
August 16, 2023

Place and Date of Judgment:

Vancouver, British Columbia  
September 13, 2023

**DICKSON J.A.:**

**Introduction**

[1] The applicant, Puppet Killer Productions Canada Inc. (“Puppet Killer”), applies pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2, for leave to appeal an arbitral award in a commercial dispute. The respondent, IndustryWorks Studios Inc. (“IndustryWorks”), opposes the application.

**Background**

**The Contract**

[2] Puppet Killer is a British Columbia based film production company. IndustryWorks is a British Columbia based film distribution company. In April 2020, IndustryWorks agreed to be the exclusive distributor of an indie horror film produced by Puppet Killer (the “Film”). The parties entered into a contract outlining the terms of a multiple rights distributor agreement (the “Agreement”).

[3] The Agreement provided that, subject to conditions precedent, IndustryWorks would sell, manufacture, and distribute the Film for 25 years and be granted exclusive distribution rights to the Film during that period or until the Agreement was terminated. It also provided that IndustryWorks would be paid a distributor fee of 30% of all gross receipts.

[4] The Agreement required Puppet Killer to deliver materials related to the Film to IndustryWorks, which obligation was a condition precedent to the Agreement. If Puppet Killer satisfied its delivery obligations, then in exchange for the Film IndustryWorks was obliged to pay Puppet Killer a \$150,000 minimum guarantee.

[5] Between April 2020 and December 2021, Puppet Killer and IndustryWorks worked together to meet Puppet Killer’s delivery obligations. IndustryWorks released the Film in theatres in September 2021. It also distributed the Film internationally.

### **The Dispute**

[6] In December 2021, IndustryWorks informed Puppet Killer it was terminating the Agreement on the basis that Puppet Killer did not fulfil its delivery obligations within a reasonable time. Although Puppet Killer disputed this allegation, in January 2022, it accepted the termination. Puppet Killer asked IndustryWorks to return the Film and to pay the minimum guarantee, but IndustryWorks refused to do either. Instead, it continued to enter into sub-distribution agreements with third parties for the marketing and distribution of the Film after the termination date.

### **Arbitral Proceedings**

[7] On March 23, 2022, Puppet Killer commenced arbitration proceedings against IndustryWorks for breach of contract. Puppet Killer sought:

- i. Judgment for debt in the amount of \$150,000 (representing the minimum guarantee);
- ii. Damages for breach of contract;
- iii. Alternatively, a declaration that IndustryWorks had been unjustly enriched, with damages to be assessed;
- iv. Damages for the tort of passing off or alternatively damages for breach of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
- v. Orders that IndustryWorks return the Film;
- vi. Prejudgment interest; and
- vii. Costs of the arbitration.

[8] IndustryWorks counterclaimed. It sought the dismissal of all of Puppet Killer's claims; damages (plus interest) for Puppet Killer's failure to deliver the Film; an award for reimbursement of the expenses it had incurred due to Puppet Killer's inexperience; and costs of the arbitration. IndustryWorks claimed that Puppet Killer

had not fulfilled its delivery obligations under the Agreement, and was therefore not entitled to payment for the Film. It denied it breached the Agreement by keeping the Film after the Agreement's termination.

[9] The arbitration was conducted by written submissions under the expedited procedures of the Vancouver International Arbitration Centre. Both parties tendered statements from multiple witnesses and experts.

[10] The arbitrator released his reasons on April 28, 2023. Puppet Killer's claim was successful in part. The arbitrator found that Puppet Killer could assume from IndustryWorks' conduct that the delivery obligations had been fulfilled or waived. He awarded Puppet Killer \$150,000 for the minimum guarantee; damages of \$50,000 for breach of contract; \$21,324.62 in prejudgment interest and required IndustryWorks to return the Film to Puppet Killer immediately. He also awarded IndustryWorks \$50,000 as reasonable expenses incurred to assist Puppet Killer to meet its delivery obligation. Based on the set-off that followed, he ordered IndustryWorks to pay Puppet Killer \$171,324.62. He dismissed all other claims of both parties.

### **The Arbitrator's Reasons**

[11] The arbitrator began with a summary of the parties' requests for relief, the factual background, procedural history, and the parties' positions. Then he turned to the discrete legal issues for determination.

[12] The arbitrator first considered Puppet Killer's claim that it was induced into the Agreement, or that there was otherwise some type of collateral contract whereby IndustryWorks had pledged to "assist [Puppet Killer] as required, and to provide financial and other assistance to [Puppet Killer] in completing its delivery obligations." The arbitrator rejected this claim.

[13] Next, he considered what he saw as the "central issue", namely, whether Puppet Killer had failed to deliver the Film. There was no disagreement that it had not met the deadline for its delivery obligations under the Agreement; the dispute

concerned whether IndustryWorks had, at any time, waived the delivery date. The arbitrator found that Puppet Killer had failed to meet its delivery obligations under the Agreement by the agreed upon date, but that IndustryWorks, by its conduct, had waived the delivery deadline to an unspecified date.

[14] The arbitrator went on to consider whether IndustryWorks had breached or repudiated the Agreement. Puppet Killer alleged IndustryWorks breached the contract in seven different instances, four of which the arbitrator accepted. The arbitrator rejected Puppet Killer's claim that IndustryWorks had breached the contract by failing to direct it in fulfilling its delivery obligations under the Agreement; by failing to complete additional deliverables it had elected to complete on behalf of Puppet Killer; and by not meaningfully consulting with Puppet Killer on its distribution strategy.

[15] The arbitrator accepted that IndustryWorks had breached the Agreement by not informing Puppet Killer of undelivered or deficient delivery materials; by not paying the minimum guarantee to Puppet Killer; by failing to produce proper accounting statements when required to do so; and by failing to return the Film to Puppet Killer. In making these findings the arbitrator made no reference to damages, with the exception of IndustryWorks' failure to return the Film.

[16] The arbitrator stated:

[115] ...I find that [IndustryWorks] breached Article 19 of the Agreement which provides that immediately following the expiration or earlier termination of the Agreement, all copies, and versions of the Picture (and portions and elements of the Picture) in the possession or control of [IndustryWorks] shall be returned to [Puppet Killer] at the expense of [Puppet Killer]. I further find that [Puppet Killer] suffered damages, which will be calculated in the later portion of this Award, by the refusal of [IndustryWorks] to return to the Film to [Puppet Killer] and by the continued marketing of the Film and distribution to third parties.

[Emphasis added.]

[17] The arbitrator rejected Puppet Killer's alternative argument that IndustryWorks had been unjustly enriched. He also rejected both of its other claims that IndustryWorks committed the tort of passing off, and that IndustryWorks

breached the *Competition Act* by continuing to market the Film after the termination of the Agreement.

[18] The arbitrator then dealt with IndustryWorks' claim that it suffered a loss as a result of Puppet Killer's failure to deliver the Film. IndustryWorks claimed it had lost out on deals with separate distribution companies which would have entitled it to a total of approximately \$40,500 had Puppet Killer met its delivery obligations on time. The arbitrator rejected this claim, predominantly due to the lack of evidence to substantiate the claim.

[19] IndustryWorks had also sought reimbursement for \$146,932 in expenses allegedly incurred due to Puppet Killer's production inexperience. It claimed Puppet Killer's struggles required it to provide significant personal and professional support, far beyond the norm for a typical producer-distributor relationship, and that as a consequence it incurred expenses. The arbitrator agreed that IndustryWorks should be reimbursed in part for those expenses it incurred in assisting Puppet Killer to complete the delivery of the materials, but he disagreed with the amount proposed.

[20] On this matter he said:

[148] First, I agree that the Agreement does not permit recovery of expenses out of anything other than gross receipts that were received by the distributor ...

[149] Second, I agree with [IndustryWorks] that some of expenses [IndustryWorks] claimed to have incurred do not meet the contractual definition of "recoupable expenses". Some of the expenses claimed related to work done by employees of [IndustryWorks] - James Clayton, Michael Matic, Caterina Scrivano, Janet Leung, Melanie Kilgour and Montana Adelberg and these expenses cannot be code as "third party" related expenses.

[150] I find that [IndustryWorks] is only permitted to recoup its expenses out of the gross receipts that it claimed, throughout this Arbitration, to have received under the Agreement. [IndustryWorks] claimed to have received the gross amount of \$16,000.00.

[151] Also, I note that [IndustryWorks] has not been fully transparent in its accounting records with [Puppet Killer]. [IndustryWorks] refused to provide accounting statements to [Puppet Killer], and it is therefore very difficult to determine that all recoupable expenses claims are actual, verifiable, bona fide, third-party expenses directly related to the production and distribution of the Film.

[152] Nevertheless, [IndustryWorks] did provide significant assistance to [Puppet Killer] in meeting the delivery obligation. Therefore, the counterclaim of [IndustryWorks] succeeds in part.

[21] The arbitrator did not determine the quantum of IndustryWorks' expenses until later in his reasons, where, on this issue, he stated:

[162] Having carefully considered the Parties' arguments in their written pleading and for the reasons stated above, I Decide, Declare and Award, as following:

...

- b. [Puppet Killer] shall
  - i. pay to [IndustryWorks] the sum of CAD \$50,000.00 as reasonable expenses incurred to assist [Puppet Killer] to meet its delivery obligation.

[22] After stating that IndustryWorks provided significant assistance to Puppet Killer and finding its counterclaim succeeded in part, the arbitrator turned to damages, costs and interests. He began by reviewing the principles governing an award for damages. He noted that, "[a]s a rule, damages for breach of contract are ordinarily assessed as at the date of breach but this presumptive date can be displaced in appropriate circumstances only where an assessment of damages at the date of breach would not fairly reflect a party's loss": at para. 154. He then stated:

[155] On the present facts before me I find that [IndustryWorks] breached the Agreement on multiple occasions during its duration and the continual refusal of [IndustryWorks] to return the Film to [Puppet Killer] is also a breach of contract which has resulted in loss of opportunity for [Puppet Killer] to market the Film by itself or secure another distributor for that purpose. However, the assessment of damages at the date of breach would adequately reflect [Puppet Killer's] loss.

[156] [IndustryWorks] shall pay Puppet Killer damages in the amount of \$50,000.00 for breach of contract.

[23] The arbitrator concluded his reasons by dealing with the costs issue. At the outset of the arbitration the parties had agreed that any costs awarded would be assessed in accordance with Scale B of the *Supreme Court Civil Rules* tariff unless ordered otherwise. Puppet Killer sought an award for special or full indemnity costs on the basis that IndustryWorks presented "fabricated and self-serving evidence and

pursued a meritless counterclaim”: at para. 158. IndustryWorks also sought full indemnity costs.

[24] The arbitrator declined to make an order for costs. His discussion of the costs issue is set out in full at paras. 157–160 of his reasons, as follows:

[157] The parties agreed at the outset of the Arbitration that any costs awarded shall be assessed in accordance with Scale B of the BC Supreme Court Rules Tariff, unless a party obtains an order assessing the costs in accordance with a different scale.

[158] [Puppet Killer] submits that considering [IndustryWorks]’ conduct in this arbitration, that an order for special or full indemnity costs is appropriate. [Puppet Killer] contend that [IndustryWorks] presented in this arbitration fabricated, self-service evidence in the form of its witness statements and Mr. Smiley’s expert report which states that delivery was not fulfilled with respect to certain items. Also, [Puppet Killer] contend that [IndustryWorks] pursued a meritless counterclaim that was unsupported by any evidence.

[159] [IndustryWorks] also made asked for costs on fully indemnity basis.

[160] I decline to make an order for costs. As neither party was fully successful, each party will bear its own costs.

[25] At para. 162, the arbitrator made the following awards:

- a. [IndustryWorks] shall
  - i. return the Film to [Puppet Killer] immediately.
  - ii. pay to [Puppet Killer] CAD\$150,000.00 the Minimum Guarantee as laid out in the Agreement.
  - iii. pay damages in the amount of CAD\$50,000.00 to [Puppet Killer].
  - iv. Prejudgement Interest in the amount of CAD\$21,324.62.
- b. [Puppet Killer] shall
  - i. pay to [IndustryWorks] the sum of CAD\$50,000.00 as reasonable expenses incurred to assist [Puppet Killer] to meet its delivery obligation.

[26] The arbitrator found Puppet Killer was entitled to payment of \$221,324.62, less a set-off of \$50,000.00 totaling \$171,324.62.

[27] After the award was issued, Puppet Killer requested leave to make submissions on ordinary tariff costs arising from the success of the parties and sought correction of a typographical error. The arbitrator denied these requests.



### **Proposed Issues on Appeal**

[28] Puppet Killer proposes the following grounds of appeal:

- i. The arbitrator erred in law by assessing the quantum of damages in the amount of \$50,000 without justification and contrary to the evidence;
- ii. The arbitrator erred in law by awarding IndustryWorks \$50,000 in expenses without justification and contrary to his finding of fact that IndustryWorks was entitled only to \$16,000;
- iii. The arbitrator erred in law by applying the test, or applying the wrong test for special costs and ordinary costs; and
- iv. The arbitrator erred in law by deciding the issue of costs without first receiving submissions from both parties and refusing to grant leave to accept further submissions on costs following his ruling.

### **Discussion**

#### **Leave to Appeal**

[29] Prior to the introduction of the new *Arbitration Act*, appeals from arbitral awards were heard by the Supreme Court under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, and much of the caselaw relevant to this application was decided under the former legislation. Now, an appeal from an arbitral award lies with this Court per s. 59(1) of the *Arbitration Act*. Section 59 of the *Arbitration Act* provides that this Court will grant leave to appeal an arbitral award on a question of law arising out of the arbitral award:

- (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
  - (a) all the parties to the arbitration consent, or
  - (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
- (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the

agreement may not appeal any question of law arising out of an arbitral award.

[Emphasis added.]

[30] The factors for this Court to consider on an application for leave to appeal are set out in s. 59(4):

On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that

- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
- (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
- (c) the point of law is of general or public importance.

[31] The Court must also consider “additional factors”, which are set out in *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 83:

Even where a s. 59 applicant identifies an extricable question of law, the Court must consider whether the proposed appeal has sufficient merit to warrant scrutiny by a division. The points raised must be arguable and there must be some prospect of success, bearing in mind the applicable standard of review: *Windshield Doctor Canada Ltd. v. Glass Masters Ltd.*, 2005 BCCA 220 (Chambers) at para. 11; *Teal Cedar Products* at para. 1.

[32] The restraints on the right to appeal from arbitral awards are in place to serve the central aims of commercial arbitration; namely, to protect the integrity of the arbitration system as a forum for speedy and final adjudication: *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 35; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 1.

***Should Puppet Killer be granted leave to appeal the arbitrator’s damages and expenses awards?***

***Parties’ Positions***

[33] To challenge an arbitral award the proposed appellant must identify an extricable question of law arising from the award: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 53–55. In *Escape 101 Ventures Inc. v.*

*March of Dimes Canada*, 2021 BCCA 313, Justice DeWitt-Van Oosten provided examples of an extricable legal error in the context of contractual interpretation:

[21] The application of an incorrect legal principle by an arbitrator, a failure to consider an element of a legal test, or a failure to consider a relevant factor will generally meet the test for an extricable question of law: *Sattva* at para. 53. A question of law may also arise where an arbitrator has forgotten, ignored or misconceived evidence and that error is shown to have affected the result of the arbitration: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 71. See also *Armstrong v. Armstrong*, 2012 BCCA 166 at paras. 65–67. There may be additional errors that engender questions of law in the arbitration context.

[34] Puppet Killer’s overarching argument on the first two proposed grounds of appeal is that the arbitrator’s damage award and expenses award reflect errors in law based on insufficiency of reasons.

[35] Puppet Killer contends the arbitrator’s reasons on damages are “inadequate and inscrutable”. In its submission, he found multiple breaches of contract but did not identify the date of the breaches he used to assess the damages or give any reason for assessing them at \$50,000—an amount that neither party claimed was appropriate. Puppet Killer argues the arbitrator provided no explanation for why the award should be less than the amount it sought and notes he declined to find the damages claim should be reduced on the basis that it was speculative, as IndustryWorks had argued. Nor did he find that Puppet Killer had failed to mitigate its damages.

[36] As to the ruling on expenses, Puppet Killer emphasizes that elsewhere in his reasons the arbitrator stated IndustryWorks was only permitted to recoup expenses out of its gross receipts, which it claimed was \$16,000. In his reasons, the arbitrator did not justify the basis for awarding \$50,000 in expenses in light of that finding. Accordingly, Puppet Killer says, the reasons give rise to a reasoned belief that the arbitrator must have forgotten, ignored, or misconceived the evidence.

[37] According to Puppet Killer, the arbitrator’s errors with respect to the quantum of damages and expenses amount to \$84,000, which is half of the total award. Particularly when considered together with the costs issues, it says that it has a

significant financial interest in the proposed appeal proceeding, which satisfies the test under s. 59(4)(a) of the *Arbitration Act*. Moreover, it says, the issue of inadequate reasons in the arbitration context is an issue of general importance, particularly given that there has been limited judicial consideration of this issue.

[38] IndustryWorks responds that Puppet Killer’s proposed grounds of appeal do not raise questions of law, as s. 59 requires. In its submission, there is no free-standing right of appeal in respect of the adequacy of reasons. According to IndustryWorks, given that only four out of seven of Puppet Killer’s claims for breach of contract succeeded, \$50,000 for damages was within the range of reasonable outcomes. Likewise, it says, the \$50,000 award for expenses was reasonable, given that it had claimed \$146,932 and Puppet Killer conceded a maximum of \$20,000 would be appropriate. According to IndustryWorks, the arbitrator’s findings concerning the “gross amount of \$16,000” referred to the “set-off amount, not the amount that could be awarded for expenses.”

[39] In light of all of these factors, IndustryWorks submits that none of the s. 59(4) factors are met and leave to appeal should be denied.

### ***Analysis***

[40] Insufficient reasons may constitute an error of law. Determining an error of law due to insufficient reasons is a two-stage analysis: (1) are the reasons inadequate; and (2) if so, do they prevent appellate review?: *R. v. Gagnon*, 2006 SCC 17 at para. 13. Reasons are inadequate if they prevent an appellate court from determining the correctness of the decision: *R. v. Sheppard*, 2002 SCC 26 at paras. 28, 55. A failure to give adequate reasons is not, however, a freestanding ground of appeal: *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at para. 7.

[41] I am satisfied that leave to appeal should be granted on the damages and expenses proposed grounds of appeal in light of the insufficiency of reasons issue. Given that determination, consistent with this Court’s practice I will not provide a detailed analysis, as that will be the role of the division that hears the appeal.

Broadly speaking, for the reasons articulated on behalf of Puppet Killer and summarized above, I am satisfied the necessary criteria under s. 59 of the *Arbitration Act* have been met on this issue.

***Should leave be granted to appeal the arbitrator's costs award?***

***Parties' Positions***

[42] Puppet Killer submits the arbitrator also failed to apply the correct legal test for both ordinary and special costs. It notes that the arbitrator did not refer to the law on special costs and says he did not apply the law. With respect to assessing "substantial success" for ordinary costs, Puppet Killer says the law is clear: where there is a counterclaim, the main action should be treated in isolation for the purpose of assessing costs, citing *Litt v. Gill*, 2016 BCCA 288. According to Puppet Killer, it was substantially successful on the main action, and the arbitrator erred by applying the wrong tests and by refusing its request to make submissions on ordinary costs after the ruling was handed down.

[43] Puppet Killer goes on to say that appellate intervention is necessary on the costs issues to prevent a miscarriage of justice. In its submission, if special costs were assessed they would be in the range of \$125,000 to \$175,000. Puppet Killer also says the issue of costs is important to those in the film industry generally and it suggests that IndustryWorks has treated other filmmakers similarly.

[44] IndustryWorks responds that costs are a matter of discretion. It says that Puppet Killer has not shown how the arbitrator applied an incorrect test nor that there has been an error of law. According to IndustryWorks, Puppet Killer has mischaracterized the award in suggesting that it was substantially successful. It says that Puppet Killer's claim regarding the amount that they may have received in special costs is purely speculative, and further, that both parties had the opportunity to make costs submissions.

**Analysis**

[45] Costs awards are entitled to a significant degree of deference. Such awards involve an exercise of discretion and the trier of fact is best placed to determine what award is most appropriate in the circumstances of the case: *Loft v. Nat*, 2014 BCCA 108 at para. 50. The power to award special costs is to be exercised sparingly, and is limited to exceptional circumstances: *Garcia v. Crestbrook Forest Industries Ltd. (1994)*, 9 B.C.L.R. (3d) 242 at para. 17 (C.A.).

[46] This Court has repeatedly commented on the circumstances in which an appellate court is entitled to interfere with a costs order on the basis that the parties were denied the opportunity to make submissions concerning costs. In *Bolin v. Lylick*, 2018 BCCA 127, this Court found the failure to do so constituted a reversible error. The Court stated:

[10] In the first of these circumstances – a party wishing to make submissions who was denied the opportunity – it is open to this court to interfere with an order for costs if, in our view, the case is made for doing so. See, for example, *Price v. Zurich Insurance Co.*, 2003 BCCA 72; *Native Citizens Fisheries Ltd. v. Walkus*, 2001 BCCA 719.

[11] In *Price*, Madam Justice Prowse said:

[45] Having read the transcript of the proceedings relating to costs, I am satisfied that the chambers judge did not permit counsel for Zurich to make her submission with respect to costs, or to refer to relevant authorities. He invited counsel to take her concerns in that regard to the Court of Appeal. She has done so.

[46] There are undoubtedly circumstances in which a chambers judge is entitled to advise counsel that he/she does not require submissions on a particular issue. The most obvious example is where the party bearing the burden of proof has not met that burden, such that it is unnecessary to call on the other side in response. In this case, however, the chambers judge entertained full submissions by counsel for Mr. Price and was persuaded by those submissions that he should make the order sought by that counsel. Having come to that conclusion, he cut off counsel for Zurich without giving her any reasonable opportunity to reply. His statement that she had the right to take his decision to the Court of Appeal was gratuitous, at best.

[47] In my view, the chambers judge's refusal to permit counsel for Zurich to address costs in any meaningful way amounted to an error in principle which entitles this Court to review his decision and, if appropriate, to interfere with it.

[Emphasis added in *Bolin*.]

[47] In *Bolin* the Court determined the judge had failed to hear submissions from both parties concerning costs, and had effectively foreclosed the defendants' submissions on costs, which was an error. Similarly, in *Loff* the Court stated:

[52] In closing, I would note that there was nothing inherently wrong with the trial judge commenting on costs in his reasons for judgment, even though the parties had not yet made submissions on costs. While it is entirely appropriate for a trial judge to indicate his or her views of costs in the reasons, when a judge does so, he or she should make clear that the costs conclusions are tentative in nature and invite the parties to make submissions on costs if they seek a different result. If that had been done in this case, it is likely the costs appeal would have been avoided.

[Emphasis added.]

[48] I agree with IndustryWorks that Puppet Killer has failed to meet the criteria for leave with respect to special costs. The arbitrator made an obviously considered decision to decline to make a special costs award with the benefit of Puppet Killer's submissions on special costs. Puppet Killer claims the arbitrator erred because he accepted factual findings which supported their claim for special costs, however, that argument lacks merit. The arbitrator is entitled to accept claims that Puppet Killer contends support the award without also making a special costs award.

[49] However, I accept that leave should be granted on the tariff costs issue. Neither party was able to make submissions on tariff costs with the benefit of the arbitrator's award. Without making any determination as to the merits of the claim, I am of the view that there is at least an arguable question as to whether the parties ought to have been given the opportunity to do so. I am also of the view that there is an arguable question with respect to the test applied by the arbitrator. Further, I am satisfied that the importance of the result to the parties justifies the intervention of the court, without accepting the submission made by Puppet Killer that there is some sort of pattern of conduct on the part of IndustryWorks, which, as IndustryWorks points out, is speculative.

[50] Again, consistent with the practice of the Court, I do not propose to say more because this matter will be dealt with by the Division.

**Conclusion**

[51] In summary, I grant leave with respect to the proposed grounds of appeal, except that I do not grant leave with respect to special costs.

- i. The arbitrator erred in law by assessing the quantum of damages in the amount of \$50,000;
- ii. The arbitrator erred in law by awarding IndustryWorks \$50,000 in expenses;
- iii. The arbitrator erred in law by not applying the test, or applying the wrong test, for ordinary costs; and
- iv. The arbitrator erred in law by deciding the issue of ordinary costs without first receiving submissions from both parties and by refusing to grant leave to accept further submissions on ordinary costs following his ruling.

“The Honourable Justice Dickson”